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IN THE

Supreme Court of the United States

October Term, 1963

No. 323

SHENANDOAH VALLEY BROADCASTING, INC., *et al.*,

Petitioners,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,

Respondent.

REPLY TO RESPONDENT'S BRIEF OPPOSING CERTIORARI

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Respondent places great reliance on the opinion of Justice Goldberg, filed August 9, 1963, in *United States* v. *FMC Corp. and American Viscose Corp.* That opinion dealt with whether the Expediting Act precluded an appeal from a denial of a preliminary injunction in a Government antitrust action. No such question is presented here. The judgment appealed from herein is a final judgment dismissing petitioners' application in an ancillary proceeding brought at the foot of an earlier antitrust decree (R. 7a-11a).

Petitioners do not contend, as respondent asserts, that petitioners have a right to appeal this judgment to the

Court of Appeals whereas the United States and ASCAP can appeal to this Court (Respondent's Brief, p. 7). Petitioners contend that the judgment herein dismissing petitioners' application does not fall within the scope of the Expediting Act; hence any appeal from such a judgment, either by a party or a non-party to the original antitrust action, would be to the Court of Appeals under 28 U. S. C. §1291. Such a result is not in any way inconsistent with the purposes of the Expediting Act. The judgment determining such an ancillary proceeding, while a final judgment entered in the original antitrust action, is neither the final judgment referred to in the Expediting Act nor so closely connected thereto as to warrant direct review by this Court. Respondent's contention that the Expediting Act precludes an appeal to the Court of Appeals in this case would, in effect, interpret the Expediting Act as precluding any appeal, either to this Court or the Court of Appeals, from an otherwise appealable judgment of dismissal. Certainly the Expediting Act was never intended to preclude any appellate review of such final judgments and should not be so interpreted.

The distinction sought to be drawn by respondent between the appeal herein and an appeal in a fee determination case is untenable. Petitioners' application was for the fixing of a fee on licenses which petitioners contended the decree required ASCAP to issue. The question presented by petitioners' application was not whether the decree should be modified to provide for the type of licenses sought by petitioners, but whether, correctly interpreted, it already so provides. Like issues could arise under any of a number of antitrust decrees with compulsory licensing

provisions that have been entered in numerous industries; for example, issues as to the particular patent rights or technical know-how which are covered by a decree providing for compulsory patent licensing. Respondent suggests no reason why such issues should stand on any different footing as to reviewability from issues as to the rate of royalty. Thus, the question presented here, whether non-party applicants under compulsory licensing provisions of antitrust decrees are entitled to appellate review of a District Court's disposition of their applications, is a question of general importance under the antitrust laws and should be decided by this Court.

Respectfully submitted,

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